

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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In the Matter of)
) CC Docket No. 98-103
Pacific Bell Telephone Company)
Pacific Bell Tariff FCC No. 128)
Pacific Bell Tariff Transmittal No. 1986)
_____)

**Comments of GST Telecom Inc.
in Opposition to the Direct Case**

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GST Telecom Inc. ("GST"), pursuant to Federal Communications Commission ("FCC") rules and the Order Designating Issues for Investigation ("ODI") in the above-captioned proceeding, files its comments in opposition to the direct case of the Pacific Bell Telephone Company ("PacBell"). GST does not believe that PacBell has met its burden of proof under § 204 of the Communications Act and, in any event, has not proposed offering an interstate telecommunications service. The FCC should dismiss PacBell's tariff filing.

I. GST's Interest in the Proceeding

GST is certificated to provide telephone exchange service and exchange access service over its own facilities in California. GST has an interconnection agreement with PacBell that requires the payment of reciprocal compensation for the termination of PacBell-originated traffic on GST's network.¹ In addition, GST also provides exchange service and Internet

¹ PacBell contends that reciprocal compensation is not directly implicated in this proceeding. See *SBC Communications, Pacific Bell Tel. Co., Transmittal No. 1986*, ODI, DA98-1772, slip op. at ¶ 9 (Rel. Sept. 2, 1998) ("PacBell ODI"). This statement seems to be correct to the extent that the ODI does not request comments on reciprocal compensation. However, a determination by the FCC that ADSL service is an interstate access service (based on its end-to-end communication) would inevitably lead to the conclusion that all Internet traffic is interstate

(continued...)

backbone links to its Internet service provider ("ISP") customers. The outcome of this proceeding could have a significant impact on the GST's operations.

II. Procedural Background

On June 15, 1998, PacBell filed Transmittal No. 1986 which established a new offering -- Asymmetrical Digital Subscriber Line ("ADSL") for 87 central offices in California. Two weeks later, the FCC suspended the PacBell ADSL tariff for one day, mandated that PacBell keep an accurate accounting of revenue received from this tariff, and opened an investigation of the tariff.² The FCC then issued an ODI on September 2, 1998 in which the FCC set for investigation the question of whether the PacBell tariff was properly tariffed at the federal level and whether a price squeeze is possible if the ADSL service is tariffed federally while the unbundled network elements comprising the service are tariffed at the state level.³ PacBell's Direct Case was due on September 11 and replies or oppositions are due September 18.

III. Section 204 and the Burden of Proof

Section 204 of the Communications Act authorizes the FCC to suspend and investigate the validity of any tariff filed with the FCC. That section also permits the FCC to suspend the tariff and then let it go into effect with the proviso that the carrier keep accurate

¹(...continued)

(in direct contradiction of 21 state regulators and federal courts). In turn, this will eliminate the contractual obligations (demanded by RBOCs and GTE) of PacBell to pay reciprocal compensation for terminating traffic on GST's network. On this issue, GST concurs with the position of the Association for Local Telecommunication Services.

² *SBC Communications Inc., Pacific Bell Tel. Co., Transmittal No. 1986*, CC Docket No. 98-103, DA 98-1293 (Rel. June 29, 1998).

³ *PacBell ODI* at ¶ 10.

revenue records because the FCC may decide to order refunds.⁴ In any tariff suspension case, the burden of proof rests with the carrier whose tariff has been suspended.⁵ The carrier is required to provide sufficient information to demonstrate the validity of the tariff, i.e., the tariff is just, reasonable and non-discriminatory.⁶ Applying these principles to the instant case, PacBell must provide sufficient evidence that Transmittal No. 1986 constitutes the provision of interstate service under Commission precedent. Whatever other issues are at stake in this case need not be decided because PacBell has not met this burden of proof.

IV. PacBell has Failed to Meet its Burden of Proof

The ADSL service at issue in this proceeding will, according to PacBell, generally be sold to ISPs, but will be available to any customer that seeks to purchase the service.⁷ Customers will not need to make a telephone call to the provider; rather the customer will simply click on the Internet icon on the computer and will obtain a direct link to the ISP over the customer's existing telephone line. The benefits of ADSL are the speed of access and the ability of the end-user to utilize a single line for voice communication while using the Internet.⁸ Despite

⁴ 47 U.S.C. § 204(a); *see Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746, 749-50 (8th Cir. 1998); *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1480-81 (D.C. Cir. 1992).

⁵ *Southwestern Bell Tel. Co. v. FCC*, 10 F.3d 892, 894 (D.C. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994); *Nader v. FCC*, 520 F.2d 182, 198 (D.C. Cir. 1975); *Beehive Tel. Co. FCC Tariff No.1*, CC Docket No. 97-249, FCC 98-105, Memorandum Opinion and Order, slip op. at ¶ 1 (Rel. June 1, 1998) ("Beehive Order").

⁶ *Beehive Order* at ¶ 21; *General Tel. Co.*, 69 FCC 2d 490 (1978).

⁷ Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Bell Transmittal No. 1986, Direct Case of PacBell, at 3 (Filed Sept. 11, 1998) ("PacBell Direct").

⁸ *Id.* Under conventional Internet access, a residential or business customer that
(continued...)

the evident increase in speed, PacBell makes no guarantee that a specific access bit rate will be achieved.

The underlying premise to PacBell's case is that the communication from the end-user to the Internet and along the Internet constitutes one communication that may be intrastate, interstate, or international and that it is impossible to determine where the communication is going. Therefore, PacBell contends that the longstanding FCC inseparability doctrine performance requires federal tariffing.⁹ PacBell also claims that the Internet traffic satisfies the 10% rule for federal tariffing of mixed-use special access lines.¹⁰ Finally, PacBell asserts that its service is exchange access and must be tariffed at the federal level.¹¹

PacBell arrives at this conclusion by asserting that the vast majority of communications to the Internet are interstate in nature and that it is impossible to distinguish between interstate and intrastate communications. PacBell presents no evidence to support either contention. PacBell cites various court and FCC holdings that note the interstate nature of the Internet. However, the putative interstate nature of the Internet has no bearing on whether the local loop and its associated facilities utilized by the end-user to communicate with PacBell's central office is intrastate or interstate. Until PacBell presents adequate data, and PacBell claims

⁸(...continued)

requires the use of the telephone and the Internet must obtain an additional telephone line dedicated to the computer modem.

⁹ *Id.* at 3-10.

¹⁰ *Id.* at 10-13.

¹¹ *Id.* at 13-15.

that it can,¹² demonstrating that the facilities utilized in ADSL service carry interstate communications, PacBell has not met its burden of proof.¹³

PacBell further contends that the amount of interstate traffic “vastly exceeds the ten percent threshold set for interstate regulation of analogous special access services.”¹⁴ PacBell fails to satisfy this test. First, the FCC’s rules for mixed-use special access lines require the customer to verify whether the special access line has more than 10% interstate traffic.¹⁵ PacBell has not provided the type of verification¹⁶ from its customer that would support application of this rule. Second, the FCC’s rule was adopted for special access lines.¹⁷ PacBell plans to send traffic for ADSL service over public-switched local telephone lines from the end-user to its central office and special access lines are not involved in that transmission.¹⁸

¹² *PacBell Direct* at Attachment B 4-5 (stating that SBC developed means to measure jurisdictional nature (interstate or intrastate) of Internet usage).

¹³ *Cf. Beehive Order*, slip op. at ¶¶ 13-14 (holding that Beehive failed to meet its burden of proof because cost data did not adequately explain operating expenses).

¹⁴ *PacBell Direct* at 12-13.

¹⁵ *See MTS and WATS Market Structure*, Decision and Order, 4 FCC Rcd 5660, 5661 at n.5 (1989).

¹⁶ *See Petition of the New York Telephone Company for a Declaratory Ruling with Respect to the Physically Intrastate Private Line and Special Access Channels Utilized for Sales Agents to Computer New York State Lottery Communications*, 5 FCC Rcd 1080, 1090 (1990).

¹⁷ Special access lines provide transmission facilities to a customer-designated location (“CDL”) or the facilities between the CDL and the serving wire center. *See PacBell Tariff* FCC No. 128, at § 7.1; *accord Competitive Telecommunications Ass’n v. FCC*, 87 F.3d 522, 524 (D.C. Cir. 1996).

¹⁸ *PacBell Direct* at 3,7 and Attachment A.

PacBell also asserts that federal tariffing is necessary because ADSL is exchange access service since it is some type of telecommunications service and it is interstate in nature. Conclusory statements, however, are no substitute for evidence. GST does not dispute that PacBell's ADSL service, as described in its tariff, represents either exchange access or telephone exchange service. What GST disputes is the naked, unsupported with facts, conclusion that it is exchange access service because no dialtone call need be made by the the end-user to gain Internet access. As GST will demonstrate, the ADSL service is not interstate and therefore, the service is telephone exchange service.

In short, PacBell has failed to meet its burden of proof. No factual evidence exists supporting PacBell assertion permitting or necessitating the need for the FCC to tariff ADSL as an interstate access service.

V. PacBell ADSL is not Interstate Telecommunications

The overriding principle underlying PacBell's case is that ADSL service is an end-to-end communication that constitutes interstate telecommunications. While such proposition may be true for the communication from the central office to the ISP or from the ISP to whichever computer is accessed by the computer user -- and to reiterate, GST does not believe that PacBell has proven this point -- it is not true for that part of the service that PacBell identifies as ADSL. Fundamentally, PacBell fails to recognize that it is tariffing a service used to carry traffic -- not tariffing the traffic itself.

As PacBell points out, the purpose of the ADSL service is to provide end-users high-speed Internet access while still allowing them to converse over their existing telephone lines. Transmission of both data and voice would occur over the same public- switched line from

the end-user to the central office. This is the ADSL portion of the service that PacBell describes in its Direct Case and tariff transmittal. That portion of the service is totally local in nature. The local loop must be qualified to provide ADSL service. The end-user customer does not require any new or dedicated lines to reach the central office. This is local exchange service¹⁹ -- the same transmission lines that a local exchange service customer would use to reach PacBell's central office for voice communications.

PacBell rationalizes the interstate nature of the telecommunications by focusing on the component of ADSL which links the aggregation point to the ISP. The argument is irrelevant because the only part of the transmission that requires ADSL technology is that from the end-user customer to the central office. ADSL technology generally is not required from the central office to the ISP or from the ISP to the Internet backbone.²⁰ Since ADSL only is used within the local loop, ADSL service must be local in nature.²¹

¹⁹ US West's nearly identical ADSL service (Megabit Subscriber Services) has been tariffed at the state level. *See, e.g.,* US West Communications, Inc., Advanced Communication Services, Oregon Advice No. 1723 (Effective Aug. 5, 1998).

²⁰ *Cf. PacBell Direct* Attachment A (showing ADSL loop only going from ISP customer to PacBell central office).

²¹ If ADSL technology is used to transmit communications from the serving wire center to the ISP or the ISP to the Internet backbone, those transmissions would have to go over ADSL qualified loops (i.e., they would have to be clear of bridge taps, remote concentrators, and other electronics associated with regular voice communications). However, PacBell does not assert that it will be providing these types of loops to the ISPs. In fact, the ISPs could and often do obtain the necessary transport from the central office to its facilities and to the Internet backbone from CLECs, such as GST.

This conclusion is further buttressed by PacBell's recognition that states will regulate the pricing for the unbundled network elements that constitute the ADSL service.²² If the individual elements are tariffed at the state level, then the combination of these elements to create ADSL service also should be tariffed at the state level. Acceptance of PacBell's argument essentially would dispossess the state commissions of authority once a carrier sought to combine the unbundled elements – an odd result especially considering the vociferousness with which PacBell argued that the FCC did not have the authority to regulate the rates of unbundled network elements.

VI. Conclusion

In short, PacBell has not sought to tariff ADSL service. Instead, PacBell fundamentally has asked the FCC, not to federally tariff ADSL service (since that is simply a technology of transmission) but to determine that Internet traffic itself is interstate in nature and requires federal tariffing. PacBell certainly has not provided sufficient evidence to support that conclusion. Nor has PacBell met its burden of proof to support federal tariffing of ADSL service. For the reasons already stated, the FCC should reject PacBell effort to federally tariff ADSL service.

Respectfully submitted,




Barry Pineles
Regulatory Counsel for GST Telecom Inc.

²² *Id.* at 15-16.

Certificate of Service

I, Barry Pineles, Regulatory Counsel for GST Telecom Inc. have caused to be mailed on this 17th day of September, 1998, postage prepaid, a true and correct copy of this Comments on and Opposition to Pacific Bell's Direct Case in CC Docket No. 98-103 to the following:

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